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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, A. D. 1943

**No. 274** 380

ALEX WASLEFF, DOING BUSINESS AS  
ALEX WASLEFF BUILDING MAINTENANCE CO.,  
*Petitioner,*

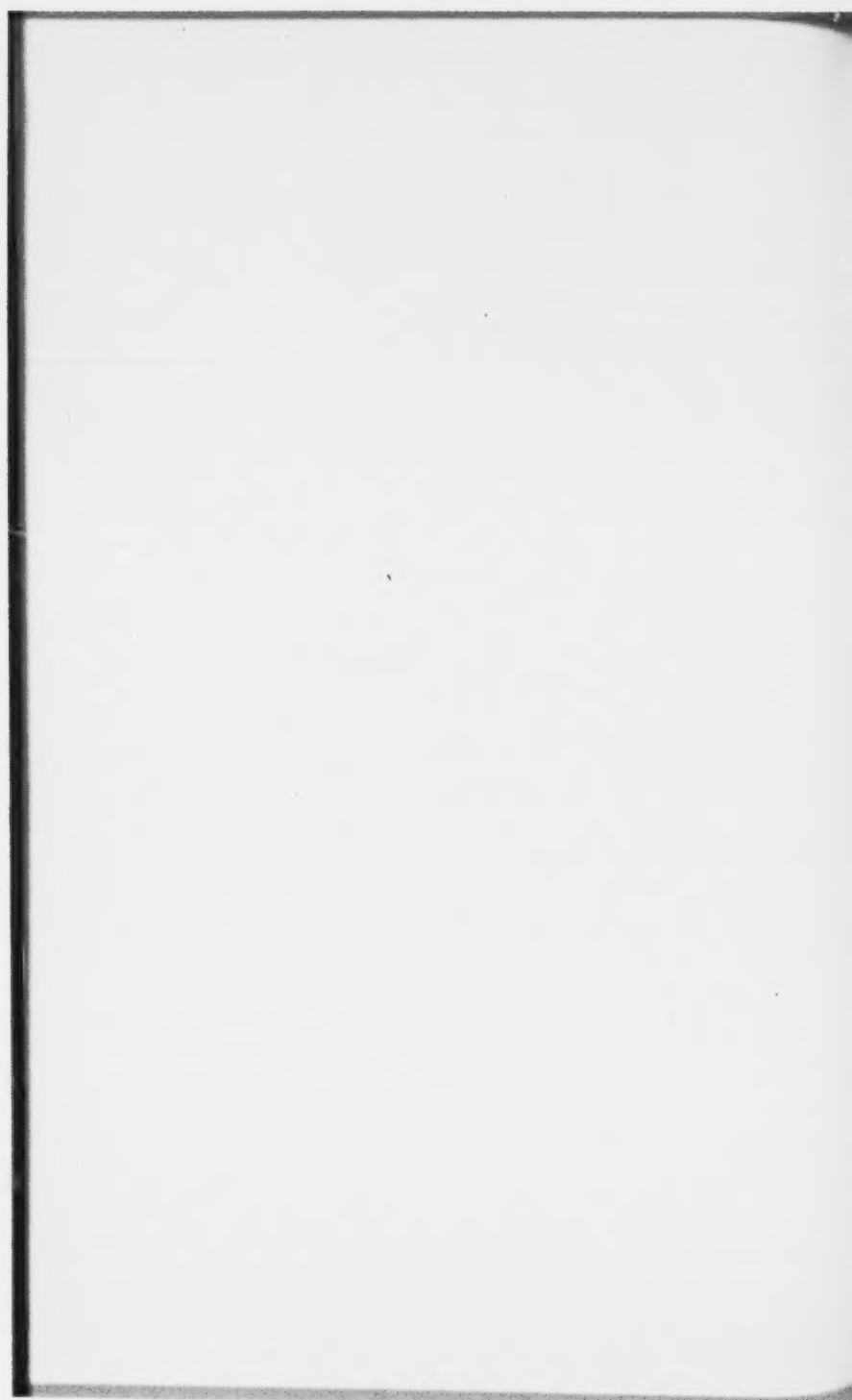
*vs.*

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

**PETITION OF ALEX WASLEFF FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT.**

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Alex Wasleff, doing business as Alex Wasleff Building Maintenance Co., Respondent, respectfully prays for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review in the interests of justice, a decree of enforcement entered by that Court on June 4,

1943, in an original proceeding brought by Butler Brothers, a corporation, Petitioner, against the National Labor Relations Board as Respondent and on the cross petition of the National Labor Relations Board against Butler Brothers and Alex Wasleff, to compel compliance with the Board's order upon both Butler Brothers and Alex Wasleff.

### **The Transcript of the Record and Proceedings Before the Circuit Court of Appeals.**

The transcript<sup>1</sup> of the Record before the Board and the transcript of the proceedings before the Circuit Court of Appeals for the Seventh Judicial Court, including the Court's opinion reported in 134 Fed. (2nd) 981 have heretofore been transmitted by Butler Brothers, petitioner.

Respondent,<sup>2</sup> Wasleff, feels that no good purpose could be served by his duplicating and filing like transcripts, and therefore respectfully moves this Court that the transcripts heretofore filed by Butler Brothers stand as his transcripts of the Record in this cause.

### **Summary and Statement.**

Alex Wasleff, an individual, doing business as Alex Wasleff Building Maintenance Company is, and for many years has been engaged in the business of performing, janitor, watchman, doorman, elevator and window cleaning services in numerous office and loft buildings owned or operated by various different concerns in Chicago.

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<sup>1</sup> The notations in this petition "App." refer to the appendix to petitioner's Brief in the Circuit Court.

<sup>2</sup> Where the word "Respondent" is used in this petition, reference is had to Alex Wasleff, an individual, doing business as Alex Wasleff Building Maintenance Company.

Butler Brothers, a corporation, is engaged in the wholesaling of general merchandise, and as a long term lessee operates a fifteen-story building located at 111 North Canal Street, Chicago, Illinois, known and referred to throughout the Record as Building "B".

Pursuant to a contract between Butler Brothers and Wasleff dated June 6, 1940, which became effective July 1, 1940, Wasleff agreed to furnish janitor, watchman and elevator service in Building "B" in accord with a work schedule incorporated into the contract. By such agreement Wasleff agreed to keep in force and maintain Workmen's Compensation, Fidelity and Public Liability insurance covering all maintenance operations carried on by his employees to the end that Butler Brothers should be held harmless of any liability for acts of commission or omission of his employees employed in or about Building "B".

Wasleff carried all of such insurance and paid all premiums therefor. He paid the prescribed employer's contribution to the Illinois Unemployment Compensation Fund and all required payments to the Collector of Internal Revenue as his contribution to Old Age Benefit Insurance for the benefit of his employees in Building "B".

Wasleff agreed to perform the services described in the written contract for a flat sum, and at the time the contract was taken he knew from his experience that the cost of his performance of the maintenance work would be much less than the cost of such work had been to Butler Brothers. In order not to disturb the orderly operational maintenance in the building and to the end that maintenance operations be carried out as theretofore, the contract contained a clause providing that Wasleff could not discharge or replace any of the present employees in Building "B" for a period of thirty days after July 1, 1940. After the thirty day period had expired Wasleff

transferred some of the employees out of Building "B" and placed them in other buildings in Chicago maintained by him. Two strong reasons appeared for his taking the foregoing steps. One was that he could replace janitors with janitresses for more efficient maintenance operation, and second, he could replace higher paid men in Building "B" with lower paid men for the reason that Building "B" is what is known as a loft building, whereas Wasleff transferred the men to other buildings which are classified as office buildings where maintenance rates charged by him were higher and he could afford to pay more money to help employed by him in office buildings.

The Board recognized the soundness of Wasleff's reasoning, for it found (App. 86) in its decision and order that:

Wasleff, while admitting his responsibility for the transfers, contends, as stated, that the controlling reason for each of them was the necessity to reduce pay-roll expenses in order that he might make a profit on the contract. We do not doubt that Wasleff was compelled after July 30, 1940, to curtail his operating expenses as a means of realizing a profit on his operations in Building B and that he choose to effect the necessary savings by reducing his pay-roll costs through transferring them with new employees at lower rates \* \* \* \* \*

In foot note No. 14 (App. 86) the Board further stated:

The evidence shows that Wasleff replaced Ward, who had been paid \$110 per month, with a man at \$75 per month; Healy, who had been paid \$120 per month, with a man at \$75; Ledford, who had been paid \$105, with a man at \$80; Pukis, who had been paid \$120, with a man at \$85; Harrity, who had been paid \$105, with a man at \$80; Fitzpatrick, whose wage rate does not appear, with a man at \$85; and Neman, War-



zecha, and Malavasi, whose wages had totaled \$275 per month, with five women whose salaries totaled \$265.

The testimony on behalf of this Respondent conclusively showed that the women replacements in the building at a cost of \$265.00 instead of \$275.00 per month paid to men janitors, produced additional revenue for this Respondent, in that the women employees were able to perform additional services for individual tenants in the building with a resultant additional income for Wasleff of \$55.00 per month without added overhead.

Respondent Wasleff has contended throughout that his business and particularly the furnishing of maintenance service to Building "B" was without the National Labor Relations act, in that he was not engaged in nor did his business affect commerce within the meaning of such act, but to the contrary all of his operations were solely intrastate. It is true that his employees operated freight elevators, but this Respondent contends the mere hauling of merchandise, either from or to a platform, which might ultimately find its way into interstate commerce did not find its way into interstate commerce unless and until such merchandise was actually placed upon a vehicle at which time the merchandise went into commerce. In *Walling, Administrator, v. Goldblatt Bros.*, 128 Fed. (2nd) 178, the Court in discussing when workers come within the protection of the Fair Labor Standards Act insofar as the handling of merchandise in commerce was concerned stated

Whether workmen unloading out-of-state goods at the warehouses are 'in commerce,' depends upon when these come to rest and lose their interstate character. They have not reached their destination until actually unloaded and deposited on the warehouse platform. Then and not until then, their interstate journey is at an end. \* \* \* Consequently, employees who

unload wares at the warehouses are working on goods still in interstate commerce, and therefore are subject to the Act. (Fair Labor Standards Act) \* \* \* So, too, as to all employees engaged in checking such interstate goods prior to the time they have come to rest on the platform. \* \* \*

Since upon delivery of the goods at defendant's warehouse, interstate movement has ceased, employees concerned solely with subsequent moving and storing of the goods in the warehouses are not in commerce. Equally clearly, employees shipping goods from the warehouses to the Illinois stores are not within the Act.

and so freight loaded on to elevators operated by this Respondent's employees, being in Building "B" at all times during its handling was not in interstate commerce, nor did their operations intimately affect interstate commerce. If Respondent's contention, therefore, is correct, the Board has no jurisdiction over its operations.

The Board has sought to fasten unfair labor practices on this Respondent for the reason, as it claims, certain statements had been made by employees of this Respondent. The test is whether or not any statements made by employees of this Respondent interfered with the organizational efforts of the union, or whether such statements would cause Respondent's employees to drop or abandon their union membership. This Respondent has repeatedly endeavored to understand which union is involved in the proceeding brought by the Board inasmuch as two separate unions, namely Local No. 66 of the Elevator Operators and Starters Union, and Local 20475 of the Warehousemen's Union appeared to have been considered by the Board as the unions sinned against. It must be remembered that although Local 66 claimed jurisdiction in Building "B", the contract (Board's Exhibit 45, App.

979) presented to Wasleff for signature was one made on behalf of Wholesale Merchandise Workers Union No. 20475. Nowhere in the Record does there appear to be a connection between the two unions with the exception that a statement was made by the business representative of Local 66 to the effect that the workers in Building "B" had been transferred to Local 66. How the workers could be transferred from the Wholesale Merchandise Workers Union No. 20475 to Local 66 when the employees were not members of 20475 has not been satisfactorily explained in any part of the Record.

The Circuit Court in its opinion in this cause (R3(2)) stated:

\* \* \* \* \* Unfortunately, however, petitioner's argument, persuasive as it appears, is more appropriate for the consideration of a trier of facts than a reviewing court. Numerous recent decisions of the Supreme Court leave no room for doubt but that the prerogative of an appellate court in reviewing a factual situation found by the Labor Board or any other administrative agency is of such a limited nature as to have no practical value. "The informed judgment of an expert administrative body" has been exalted to the point where its findings must, except under extraordinary circumstances, be accepted as conclusive. Moreover, many questions heretofore regarded as legal or at least mixed questions of law and fact, subject to review, have been by judicial fiat shunted into the factual category so as to further limit the function of a reviewing court. *So in the instant case, as in many others, any logic or reasoning which might otherwise appeal to our sense of fairness and justice must be ignored in view of the extremely narrow limits of our authority as delineated by the Supreme Court.* Thus, no good purpose can be served in dealing at length with the facts of a case such as the one before us.

In discussing the reasons for the transfer of some of the employees out of Building "B" to other buildings maintained by Wasleff, the Court stated (R3(2)):

While the reason assigned for such action as to some of these employees is not incredible, in fact appears reasonable and logical \* \* \* we cannot say the Board's conclusion is without substantial support.

The Circuit Court in its opinion was of the view that Butler Brothers and Wasleff occupied some sort of a dual capacity as employers and admitted that the exact status of the parties was difficult of definition. The Court further stated that the Board had also encountered difficulty in this respect. It is of the utmost importance that there be definiteness as to the relationship of the parties to the employees, and a determination should be made as to which of the Respondents was the employer. If, for instance, the Respondent, Wasleff, had agreed to abide by the Board's order, his hands would be tied because the order, as framed, designates him as a sort of an employee and not as an employer of the help in Building "B". That in view of the order of the Board and the opinion of the Circuit Court it would be dangerous for any building owner or operator to contract with the Respondent Wasleff, for fear that it or they might be bound by Wasleff's acts, insofar as the Act is involved.

Butler Brothers, by its petition for the issuance of a Writ of Certiorari and by its Brief has covered the field of reasoning in support of its contention that the Writ issue, and that this Court reverse both the Circuit Court and the Board on their respective findings and orders, and this Respondent should like to have the advantage of the relevant portions of Butler Brothers' petition and Brief in support of his own motion for the issuance of the Writ.

## JURISDICTION.

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The decree of the Circuit Court of Appeals was entered on June 4, 1943. Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended.

### Questions Presented.

1. Was the evidence of alleged statements by Wasleff's employees substantial enough so that a valid order could be based thereon?

2. Was or was not Wasleff the employer of the maintenance employees in Building "B" after July 1, 1940, or was Wasleff merely a foreman acting for Butler Brothers?

3. Was Wasleff's business such that it affected commerce within the meaning of the act where none of his operations were performed or conducted outside of the City of Chicago, Illinois, where the services rendered by him consisted solely of the type of work heretofore described?

4. Did the Circuit Court of Appeals give this Respondent a fair trial or hearing where by its opinion it positively stated that its power of review was of such a limited nature as to have no practical value, and that although any logic or reasoning which might otherwise appeal to its sense of fairness and justice in this cause must be ignored in view of the narrow limits of its authority as delineated by the Supreme Court of the United States?

5. Was the Circuit Court correct in ignoring the dictates in the decisions of this Court in *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, and *National Labor Relations Board v. Sands Manufacturing Co.*, 306 U. S. 332?

6. Under the circumstances involved in this case did the Board have the right to declare the maintenance contract a sham and a fraud entered into solely for the purpose of allowing Butler Brothers to evade its duties under the National Labor Relations Act.

### REASONS FOR GRANTING WRIT.

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1. Was the evidence of alleged statements by Wasleff's employees, substantial enough so that a valid order could be based thereon?

The order of the Board and the holding of the Circuit Court are in direct conflict with the directive and findings in *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, this Court having distinctly stated therein that independent statements of employees of an employer, when brought to the attention of the Board were not sufficient in themselves upon which a valid order could be founded for the reason that such statements of themselves did not constitute substantial evidence within the meaning of the act.

2. Was or was not Wasleff the employer of the maintenance employees in Building "B" after July 1, 1940, or was Wasleff merely a foreman acting for Butler Brothers?

The Circuit Court in its opinion stated that both it and the Board had some difficulty in determining Wasleff's status as an employer or as a foreman or employee of Butler Brothers. This question should have been distinctly answered to the end that future confusion might be avoided where a dual relationship is charged.

3. Was Wasleff's business such that it affected commerce within the meaning of the Act where none of his operations were performed or conducted outside of the City of Chicago, Illinois, where the services rendered by him consisted solely of the type of work heretofore described?

The Board's complaint alleges among other things that the Respondent Wasleff's company comes within the purview of subdivisions (6), (7) of Section 2. Subdivision (6) of Section 2 defines the term "commerce" as follows:

The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

By the Act the term "affecting commerce" is defined as follows:

The term 'affecting commerce' means in commerce, or burdening or obstructing commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

If this Respondent served only business engaged in intra state commerce, its business would not affect commerce within the meaning of the Act; and inasmuch as this Respondent carried on his activities and all work or service rendered by him was of an intrastate character, that is, he performed no work or labor outside of the confines of the State of Illinois the Board had no jurisdiction of Wasleff.

This Court in the matter of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. at page 31, stated:

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. \* \* \* \*

and further the Court, at page 37, stated:

Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Nowhere has it been charged nor claimed that Wasleff's employees loaded or unloaded merchandise or items in commerce from or into vehicles which fanned out into commerce. All merchandise or freight handled by Wasleff's employees came to rest before going into interstate commerce.



4. Did the Circuit Court of Appeals give this respondent a fair trial or hearing where by its opinion it positively stated that its power of review was of such a limited nature as to have no practical value, and that although any logic or reasoning which might otherwise appeal to its sense of fairness and justice in this cause must be ignored in view of the narrow limits of its authority as delineated by the Supreme Court of the United States?

By finding that its jurisdiction to review was of no practical value Respondent contends that he did not have a fair trial or hearing in the Circuit Court. This Court should, if at all possible, once and for all, determine and state the authority of a Circuit Court in examining on review orders of administrative bodies. The United States Supreme Court has certainly not shorn the lower courts of their rights to examine into the substantiality of evidence presented before administrative bodies, nor has this Court deprived the lower Courts of using logic or reasoning in arriving at their decisions. To the end that the foregoing might be brought to the attention of the various Circuits the Writ should be issued to avoid further like findings.

5. Was the Circuit Court correct in ignoring the dictates in the decisions of this Court in *National Labor Relations Board vs. Virginia Electric & Power Co.*, 314 U. S. 469 and *National Labor Relations Board vs. Sands Manufacturing Co.*, 306 U. S. 332?

The Board has found that statements were made by Respondent's employees which in effect constituted unfair labor practices and which allegedly showed union hostility. The right of free speech has not been abrogated. That was decided in the *Virginia Light & Power* case. If the Board had connected up the Respondent with a background of

unfair labor practice or union hostility, the Board may have been correct in issuing its order. The Board found that Wasleff refused to recognize the representatives of Local 66 of the Elevator Operators and Starters Union. Respondent contends that he rightfully refused to deal with the representative of that local for the reason that such representative had called a strike in Butler Brothers' Building "B" without notice to him and without making any demand upon him as to wages or working conditions. Wasleff agreed that he would reinstate the strikers if O'Grady (the union's business agent) would stay out of the picture. When O'Grady, the business agent of the local, testified under cross examination, he testified as follows:

"I don't know whether or not I told the boys what they were striking for, and I was trying to get hold of Wasleff. I told a couple of the boys that I wanted recognition."

When interrogated as to the names of the boys to whom he had told this, he names Ledford only, but that Ledford did not come out on strike. The Respondent was absolutely justified in refusing to deal with the representative of the union, who, as the Record shows, was subsequently voted out of office, possibly for engineering a strike for no reason whatsoever.

As stated, O'Grady called the strike without any demand for higher wages, recognition or better working conditions for the men in Building "B". Immediately prior to the time that this strike was called, a strike was in progress in the Mercantile Division of Butler Brothers which was settled without the advice or help of O'Grady. O'Grady complained bitterly, as the Record shows, that one Briegel, business representative of No. 20475 had double crossed him in settling the warehousemen's strike without consulting him. The Board should have taken all of these facts

into consideration in arriving at its conclusion as to whether or not Wasleff was wrong when he refused to bargain with O'Grady, the chosen representative of Local 66.

6. Under the circumstances involved in this case did the Board have the right to declare the maintenance contract a sham and a fraud entered into solely for the purpose of allowing Butler Brothers to evade its duties under the National Labor Relations Act?

If the decision of the Circuit Court of Appeals is allowed to stand, the finding that the contract was entered into as a mere sham or fraud for the purpose of evasion under the Act, this Respondent's business might be adversely affected even though he is innocent of the charges made against him by the complaint.

### CONCLUSION.

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WHEREFORE, it is submitted that the Petition for Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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